

No. 12,323

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EARL A. ERNST,

Appellant,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G. CLEMENS
and H. G. McBRIDE doing business as IDEAL MANUFACTURING COMPANY,

Appellees.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

*To the Honorable, the Judges of the United States Court
of Appeals for the Ninth Circuit:*

Comes now the appellant and petitions this Honorable Court for a rehearing of this appeal, upon the grounds hereinafter set forth.

Appellant conscientiously believes that this Honorable Court, in its opinion, filed November 9, 1950, affirming the judgment the lower court labored under misapprehensions of fact and law and unwittingly failed to consider the most vital evidence and the controlling facts of the case, which facts when the applicable patent law is correctly applied thereto, must necessarily compel a reversal of said judgment of the lower court.

A grave injustice has been done to Plaintiff-Appellant, Earl A. Ernst, by the ill-considered judgment of the District Court, and the unwitting affirmance of that judgment by this Honorable Court, which judgment, holding Claim 1 of Letters Patent in suit, Reissue No. 22,740, of Plaintiff-Appellant, not infringed by the crude imitation Sack Jigger machines of Defendants-Appellees, as particularly shown in Plaintiff's Interrogatory Exhibits 3-3, which particular machines were not even considered or ruled on in the decision of the trial judge.

Patent No. 2,288,159 Excluded From This Petition.

This petition for rehearing has been materially shortened by excluding therefrom consideration of appellant's Letters Patent in suit, No. 2,288,159, June 30, 1942, for sacking device, and restricting this petition to appellant's Letters Patent, Reissue No. 22,740, April 2, 1946, for Sack Jigger. Appellant, however, in eliminating his said Letters Patent No. 2,288,159, from this petition, waives no rights which he may have under said letters patent.

Patent Infringement of Reissue Patent No. 22,740 Proved by Plaintiff's Interrogatories.

Plaintiff's-Appellant's suit for infringement of his Patent Reissue No. 22,740, for Sack Jigger, was based and tried upon, and proved by the Defendant's-Appellees' Answers to Plaintiff's Interrogatories IV, VI and XI, which interrogatories were directed to the form of Defendant's-Appellees' Sack Jigger shown in the photographs, Plaintiff's Interrogatory Exhibits 3-3. Defendant's-Appellees' Answer to Plaintiff's Interrogatory XI definitely admits that Defendants-Appellees have made and sold an apparatus as illustrated in said two photographs, Plaintiff's Interrogatory Exhibits 3-3, prior to the filing of Plaintiff's-Appellant's suit.

Claim 1 of Reissue Patent No. 22,740 Sued on.

Claim 1 of Patent Reissue No. 22,740, which claim is sued on, is reproduced here below, with the reference numerals of the specification of the patent, designating the elements, respectively, of said claim, appearing in said claim after each element therein, as follows:

“1. In a device for shaking containers and the like (34) to settle the contents thereof, a frame work (1 to 11 inclusive) a platform (22) for supporting a plurality of containers, (34) hinge means (23) supporting the platform from the framework, vibratory means (58) connected to the platform for shaking it and the containers supported thereby, said means including a pitman (59) adjacent the platform, coupling means (60) connecting the pitman with a portion of the platform, and rotary means (56) attached to the pitman for reciprocating it, said platform including an elongated surface (22') with container stations (28) from the ends thereof to a central open locus (1), said vibratory means (58) having its connection (60) with the platform at this central locus (1).”

Comparison of Elements of Patent Claim and Accused Machines.

Every element of the Plaintiff's-Appellant's above stated Claim 1 of his Patent in Suit, Reissue No. 22,740, is found in Defendants'-Appellants' accused machines shown particular in Plaintiff's Interrogatory Exhibits 3-3, with only two slight immaterial changes, to wit: (a) the cutting of Defendants'-Appellees' platform or jigger board (22) into *two* sections instead of making the same in *one* continuous board like Plaintiff's-Appellant's platform or jigger board (22) and (b) the use of *two* bars or pitmans (59), in-

stead of using only *one* bar or pitman (59) as in Plaintiff's-Appellant's patent. Such slight changes of form amount to nothing more than a distinction without a *legal* difference, or the difference between tweedledum and tweedledee, since the Defendants'-Applees' platform or jiggerboard (22) made in *two* sections, and their *two* bars or pitmans (59) perform the *same function* and accomplish the *same result*, respectively, as Plaintiff's-Appellant's platform or jigger board (22) made in *one* continuous board, and his single or *one* bar or pitman (59). All of the remaining elements 34, 1 to 11, 23, 58, 60, 56, 22' and 28 of Claim 1 of the patent now in suit and in the Defendants'-Appellants' accused machine as shown in Plaintiff's-Appellant's Interrogatory Exhibits 3-3, are identical. Defendants-Appellees have only changed the *form*, and have *taken the substance* of the Plaintiff's-Appellant's invention, as embodied in Claim 1 of his patent in suit Reissue No. 22,740, and such reprehensible conduct constitutes a wilful and wanton infringement of said patent in suit by Defendants-Appellees.

Law of Infringement Applicable to Slight Changes in Accused Machines.

"An infringement is not averted * * * by separation of *one* integral part into *two*, the parts doing substantially what was done by the single part."

Walker on Patents, Vol. III (Deller's Ed), pp. 1698-1699, Sec. 462.

"Reissue patent No. 18,841, claim 2, relating to Croquignole style of hair waving, was infringed, notwithstanding use of *one* clamp for *two* clamps disclosed in claim, and use of *spring* to prevent hair from unwinding during heating instead of *metallic flexible retainer* disclosed in claim."

Johnson v. Philad., 96 F. 2d 442 (C. C. A. 9).

“Infringement is not avoided by dividing an *integral element* of the patented machine into *two or more* distinct parts, so long as the function and operation remain substantially the same.”

Kings County Raisin & Fruit Co. et al. v. United States Consol. Seeded Raisin Co., 182 Fed. 59 (C. C. A. 9);

Angelus Sanitary Can Mach. Co. et al. v. Wilson et al., 7 F. 2d 314-319 (C. C. A. 9th Cir.).

The slight changes of *form* of Defendants'-Appellees' machine, Plaintiff's Interrogatory Exhibits 3-3, without changing the *function, operation, results or substance* of Plaintiff's-Appellant's invention, as covered by Claim 1 of his Patent, Reissue No. 22,740, do not avoid infringement of said claim of Plaintiff's-Appellant's said patent.

“Mere change of form, which contain all elements of patent claim, are infringements of the patent.”

Walker on Patents, Vol. III (Deller's Ed.), page 1690, Sec. 457.

“Change of *form* without change of *function* does not avoid infringement.”

Machine Co. v. Murphy, 97 U. S. 120.

“The patentee having described his invention and shown its principles, and claimed it in that *form* which most perfectly embodies it, is in contemplation of law, deemed to *claim every form* in which his invention may be copied, unless he manifests an intention to disclaim some of those forms.”

Western Electric Co. v. La Rue, 139 U. S. 601, 606, 11 S. Ct. 670, 35 L. Ed. 294.

“Where alleged infringing devices embody the heart of the patented invention, minor differences will not avoid infringement.”

Florence-Mayo Nurway Co. v. Hardy, 168 F. 2d 778 (C. C. A. 4) (1948);

Stubnitz-Green v. Fort Pitt, 110 F. 2d 192 (C. C. A. 6) (1940).

Strong Evidence of Infringement of Patent by Accused Machines.

“To constitute ‘infringement’ it is unnecessary to demonstrate substantial identity between machines to a mathematical certainty, but ‘*infringement*’ connotes *correspondence as to the substantial dominant and essential elements.*”

Bianchi v. Barili, 184 F. 2d 793 (C. C. A. 9th Cir.).

From a fair comparison of the elements of Defendants'-Appellees' machine, Plaintiff's Interrogatory Exhibit No. 3-3, with the elements of Claim 1 of the patent in suit, Reissue No. 22,740, there will definitely be found *a clear correspondence of the substantial, dominant and essential elements* of said accused machine of Defendants'-Appellees, to the same elements of Claim 1 of said reissue patent in suit, which *correspondence connotes infringement* of said claim of said reissue patent by Defendants'-Appellees. A careful comparison, *element by element*, of the elements of Defendants'-Appellees' said machine [Int. Ex. 3-3] with the elements of Claim 1 of said patent, Reissue No. 22,740, is found on pages 47 to 53, inclusive of Appellant's Opening Brief, which it is hoped this Honorable Court of Appeals will find time to read in the light of this petition.

Plaintiff's expert Harry Gearing gave no testimony concerning the question of infringement of Claim 1 of the patent in suit now before this Honorable Court, Reissue No. 22,740. [Tr. 202-297.]

Defendants' expert, J. Walker Glenn, did not testify as to infringement of the patent in suit Reissue No. 22,740 by Defendants'-Appellees' machine, as shown in Plaintiff's Interrogatory Exhibit 3-3, or any other machine of Defendants'-Appellees. [Tr. 117-195.]

Plaintiff-Appellant, Earl A. Ernst, testified positively and at length that Defendants'-Appellees' accused machine, Plaintiff's Interrogatory *Exhibits No. 3-3 and other machines infringed* Claim 1 of his Patent, Reissue No. 22,740. [Tr. 57-90, and particularly *on cross-examination* pp. 77, 79 and 87.]

Defendants-Appellees admitted infringement of Claim 1 of patent in suit, Reissue No. 22,740, *in their answers to Plaintiff's Interrogatories IV, VI and XI*, by admitting that "the defendants have made and sold an apparatus as illustrated therein" [Interrogatory Exhibits 3-3].

The foregoing analysis of the evidence definitely establishes the fact that there was *no evidence produced by Defendants-Appellees or otherwise, which supports any finding of fact that Defendants-Appellees have not infringed* Claim 1 of the patent in suit Reissue No. 22,740, while the testimony of Earl A. Ernst [Tr. 79 and 85] and the documentary evidence, *Answers to Plaintiff's Interrogatories IV, VI and XI, and Exhibits 3-3, clearly prove by a preponderance of evidence that Defendants'-Appellees' machine, particularly shown in said Interrogatory Exhibits 3-3 definitely infringe Claim 1 of the patent in suit* Reissue No. 22,740.

Decision of District Court Includes False Analysis of Question of Infringement.

In the decision of the lower court the District Judge made no comment wherever, on the question of infringement of Claim 1 of the patent in suit, Reissue No. 22,740, *by the Defendants'-Appellees' machine, Plaintiff's Interrogatory Exhibits 3-3, the most vital evidence of infringement in the whole case*, but made a crude and grossly incorrect analysis of Plaintiff's Exhibit 11C, contrary to the

evidence, and erroneously held generally on the basis of said *false analysis* of said Exhibit 11C, that none of the machines of Defendants-Appellees, including said Interrogatory Exhibits 3-3, infringed Claim 1 of the patent in suit, Reissue No. 22,740. The accused machine, Plaintiff's Interrogatory *Exhibits No. 3-3* is a *different machine* from that of the accused machine, Plaintiff's *Exhibit 11C*, and consequently no ruling of the court, that said last named machine [Ex. 11C] *does not* infringe Claim 1 of the patent now in suit, Reissue No. 22,740, could automatically prove that Defendants'-Appellees' machine, Plaintiff's Interrogatory *Exhibit 3-3*, likewise, *does not* infringe said claim of said patent, any more than one particular accused *device*, which might infringe one claim of a patent, would necessarily and automatically infringe all or any other claims of the patent, since each claim of a patent covers a *different* invention.

Wire Tire Mach. Co. v. Pacific, 102 F. 2d 543,
C. C. A. 9 (1939).

Jigger Board Movement.

The particular movement of the jigger board or platform 22 of Plaintiff's-Appellant's machine is very important. We did not have time to go into this feature of appellant's invention although the Court at the hearing of the appeal showed an interest in the same. The movement of the jigger board is a back and forth *horizontal* reciprocating movement of *2 inches* and a slight up and down *1/16 of an inch vertical* movement. The movement of the jigger board is accomplished by *hinge means* specified in the patent claim and shown in the patent drawing as hanger straps or links 23, and as shown in Interrogatory Exhibit 3-3 of the accused machine. Chains are also used instead of said straps 23. The jigger board move-

ment is shown in the diagram print, Plaintiff's Exhibit 13. Appellant's jigger board movement is not shown in the prior art, but is shown in every one of the Appellee's machines. Testimony concerning appellant's jigger board movement is found in Tr. 57, 58, 66, 92 and 100.

Immaterial Matters Presented in Appellees' Brief.

On pages 22-25 of the Brief for Appellees, under the heading, "*B. Claim 1 of Reissue Patent No. 22,740 Is Clearly Not Infringed by the Defendants,*" several irrelevant and immaterial matters are misdirected against the patent in suit in a feeble attempt to show that there is no infringement by Defendants-Appellees of the patent in suit, Reissue No. 22,740, despite the fact that every element of Claim 1 of said patent finds its analogue in the machines of the Defendants-Appellees, and particularly in the machine shown in Plaintiff's Interrogatory Exhibits No. 3-3, Plaintiff's Exhibit No. 11C, and other machines. Said matters argued under said heading on pages 22-25 of appellees' brief relate, either to matters which are irrelevant or immaterial, or to the *validity* of the patent in suit, which has been held *valid*.

Character of Patent in Suit.

When a patent is held valid, the court, in determining the question of infringement, first determines whether the patent is a primary or a secondary patent. If *primary* the court gives the patent a liberal construction to secure to the inventor the reward to which he is entitled.

Walker on Patents (Deller's Ed.), Vol. II, pp. 1209-1212, Secs. 245-247;

Eibel Process Co. v. Minnesota and Ontario Paper Co., 261 U. S. 45, 63, 43 S. Ct. 279, 79 L. Ed.

Primary or Secondary Patent.

We have contended and still contend that the appellant's patent, Reissue No. 22,740, is a *primary* patent, because: (1) it brought into the art for the first time the *jigger board* for settling and packing *potatoes* and the like in sacks; (2) it was the *first machine which automatically jiggled* the potatoes for settling and packing the same in sacks, in other words it was the first *automatic jigger* in the potato-sacking art; (3) *it performed a new and useful function never before performed in automatically jiggling potatoes and the like to settle and pack the potatoes* in sacks, which function of jiggling potatoes for sacking the same *had been done only by hand* before the advent of the Plaintiff's-Appellant's invention. Moreover, Plaintiff's-Appellant's *automatic* sack jigger increased the output of the only potato sacking machine [Plaintiff's Exhibit 7] in use at the time from 150 filled sacks per hour, to from 500 to 600 filled sacks per hour, and thereby revolutionized the potato-sacking industry [Tr. 53-55].

However, since every element of Claim 1 of the patent in suit is found in the machine of Defendants'-Appellees, Plaintiff's Interrogatory Exhibit 3-3, and *performs the same function in substantially the same way*, as the corresponding element, in said claim of said patent, it is immaterial whether the patent in suit is a *primary* or a *secondary* patent, since—

“Any patent has some range of equivalents, unless form is made the indispensable thing, and the rule is especially applicable where an infringer takes the whole gist of the invention (Frick Co. v. Lindsay, 27 F. (2d) 59, 62, C.C.A. 4 (1928); see also Skelton v. Baldwin Tool Works, 58 F. (2d) 221, 224, C.C.A. 4 (1932). Where an invention marks a substantial advance in the art, the patent is given a reasonably

liberal construction so as to secure to inventors the rewards to which they are entitled. (The Portland Telegram v. New England Fibre Blanket Co., 38 F. (2d) 280, C.C.A. 9 (1930); Walker on Patents (Deller's Ed.), Vol. II, p. 1212, Sec. 247."

Paper Patents Set Up Against Patent in Suit.

All of the prior art patents set up in Paragraph XIII of the First Amended Answer to Complaint against the *validity* of Patent Reissue No. 22,740 are nothing more than *paper* patents, since there is no evidence whatever that any of the machines disclosed in any of said prior patents was ever built and operated, and there is nothing in any of said patents to show that they could be used for sacking *potatoes*, yet the Defendants-Appellees have the effrontery to contend that Plaintiff's-Appellant's invention is in a *crowded* art.

Pointer v. Six Wheel Corporation, 177 F. 2d 153 at p. 161 (C.C.A. 9).

No Defense Established as to Scope of Patent in Suit.

In the defendants' Amended Answer Paragraphs XIII to XIX, contain the only defenses set up against the patent in suit, Reissue No. 22,740, and said defenses are directed only to the defense of *invalidity*, with variations, which defenses were not sustained, because the lower court held said reissue patent *valid*, and said defenses of invalidity have gone a glimmering. The Defendants' Amended Answer failed to set up any other defense and particularly any defense that any valid or legally effective prior art approached the invention in suit to such an extent as to *narrow the scope* of Claim 1 of the reissue patent in suit, No. 22,740, sufficiently to prevent Claim 1 of said patent from reading

letter perfect on the accused machines of the Defendants'-Appellees'; yet counsel for the Defendants-Appellees have padded their Findings and Conclusions on a false defense concerning *the scope* of the patent in suit with nothing in their pleading or evidence to support it. Such defense concerning the scope of the patent in suit was not, and is not now available to Defendants-Appellees, and the Conclusions of Law and the Judgment of the Court based upon such an unsupported defense are grossly irregular and a nullity. Not even the file wrapper of the patent in suit was pleaded by the defendants, and it had to be pleaded to be available at the trial. Counsel for Defendants-Appellees falsely assert that because the Plaintiff-Appellant appealed a claim in his application for his patent in suit, in the Patent Office and lost the appeal, that the rejection of said claim by the Patent Office, which claim was not broader than Claim 1 in this suit, as counsel wrongly asserts, narrows the scope of said Claim 1. Such assertions are *a reductio ad absurdum*, because the *appealed* claim covered an entirely *different combination* of elements and a *different invention* from that of Claim 1 of the patent in suit, and the rejection of the appealed claim by the Patent Office has no effect whatever on Claim 1 in suit. Incidentally said Claim 1 of Patent Reissue No. 22,740 in suit was never amended and is exactly the same as it was filed in the original patent No. 2,347,474, of which the patent in suit is a reissue. Counsel for Defendants-Appellees failed to establish any evidence of any probative value by asking Plaintiff's-Appellant's expert Gearing, if, by reason of his hindsight, he could reconstruct the prior *paper* patents, set up in the Amended Answer, and produce the *invention* in suit. Any so-called admissions of an expert in answer to such absurd hypothetical questions would be too speculative to rise to the dignity of legal evidence and proof.

Such practice of reconstruction of an invention in suit from prior art has been condemned by the Supreme Court in *Topliff v. Topliff et al.*, 145 U. S. 156, 36 L. Ed. 658, and by *Kellogg Switchboard & Supply Co. v. Michigan Bell Tel. Co.*, 99 F. 2d 207, C. C. A. 6 (1938), cert. den. 308 U. S. 582, 84 L. Ed. 488 (1939).

Detailed Consideration of District Judge's False Analysis of Question of Infringement.

The District Judge in his decision [Tr. 17, 20] made an incorrect analysis of three "Elements" of the patent in suit, Reissue No. 22,740, as follows:

"Element 1: Instead of Pitman adjacent the platform, we find a cross bar [Exhibit 11c]."

According to Element 1 of his analysis the District Judge finds *no pitman* "adjacent" the platform, but finds a "*cross bar*" instead. Said finding is contrary to the evidence. [See testimony of Ernst Tr. 77-79 and testimony of Glenn Tr. 155-156.] The term "adjacent" in the patent in suit, Reissue No. 22,740 does not necessarily mean "resting against," as the District Judge would strictly misconstrue said term, but would also mean "near" or "spaced from" the platform at a suitable distance for connection of the pitman to the platform, so that the pitman, when reciprocated by the jigger of the machine, will in turn reciprocate, or jigger the platform and the bags of potatoes on said platform. In the patent in suit, Reissue No. 22,740, Fig. 1, the pitman 59 is shown spaced a short distance *above* the platform 22, while in Plaintiff's Exhibit 11c, and in Exhibit 13 (blue print), which shows the same machine as said Exhibit 11c, the pitman is shown spaced *horizontally* along the inner side edge of the platform, the pitman, in the form of a long channel beam extending

longitudinally of the machine being indicated (1) and the platform being indicated (3) in said Exhibit 13 (blue print). The “cross bar” referred to in the District Judge’s analysis, “Element 1”, is the cross member at the left end at the lower part of the machine, and is not, and does not function as a pitman, but is merely *a connection between the outer end of the pitman (1) and the platform*, which connection is indicated 60 in Fig. 1 of the patent in suit and is indicated 2 in Paintiff’s Exhibit 13 (blue print).

“Element 2: Instead of a central open locus, the accused device shows a board, not at center [Exhibit 11a].”

This Element 2 of the District Judge’s analysis is grossly incorrect. The accused machine, Exhibit 11a, definitely has a central open locus, which is the open space in the center of the frame between the ends of the frame of the machine and in which the gears and chains of the operating mechanism of the machine are located in said Exhibit 11a. The central open locus is the central open frame unit indicated 1, appearing in the specification, first page, second column and lines 1 and 2, and indicated 1 in Fig. 1 of the drawing of the patent in suit, Reissue No. 22,740. Said central open locus is also shown in Exhibit 13 (blue print) where the rotary means (6) attached to the inner end of the pitman (1) is located opposite the board (5) referred to in Element 2 of the District Judge’s analysis, as “not at center,” but which in fact *is* at center of the machine.

“Element 3: A rigid connection takes the place of one long board (The jigger connection is at the end of the machine).”

The “rigid connection” referred to in Element 3 is evidently the “board not at center” referred to under Element 2. Said rigid connection is for connecting the inner ends of two sections of a platform or jigger board cut in half, so that the said platform or board are made in *three* pieces instead of *one* as shown in the patent in suit, but infringement of a patent is not avoided by making an element in *two or more* pieces instead of *one*.

Kings County Raisin & Fruit Co. et al. v. United States Consol. Seeded Raisin Co., supra.

The fact that the jigger connection is at the end instead of at the center of the machine does not avoid infringement of a patent, because this would be merely a change of position of parts.

Bianchi v. Barili, supra.

Infringement of Patent in Suit, Reissue No. 22,740, by Defendants-Appellees Conclusively Proved.

In the last analysis of the infringement of Claim 1 of the patent in suit, Reissue No. 22,740, we again bring to the attention of this Honorable Court, that every element of said claim of said patent finds its analogue in the Defendants'-Appellees' machine, Plaintiff's Interrogatory Exhibits 3-3. This was all Plaintiff-Appellant had to show to prove infringement of Claim 1 of the patent in suit, Reissue 22,740.

A duplicate of each of the Interrogatory Exhibits 3-3, and Plaintiff's Exhibit 11c, with the reference numerals of the specification and Claim 1 of the patent in suit applied to corresponding parts of said duplicate exhibits is being forwarded to the Clerk of the Court. The numeral 22' (not in the patent), is applied to the elongated surface with

container stations 28 of the platform 22, and the numeral (1) of Plaintiff's Exhibit 13 is shown applied to the pitman of Plaintiff's Exhibit 11c as well as the numeral 59 of the patent in suit. The corresponding elements of the patent claim and the accused machine, Plaintiff's Interrogatory Exhibits 3-3, are thus positively identified by said reference numerals. Infringement of Claim 1 of the patent in suit, Reissue No. 22,740, by the accused machine of Defendants-Appellees, shown in Plaintiff's Interrogatory Exhibits No. 3-3, is thus fully established by positive and conclusive proof, and the *Findings of Fact, Conclusions of Law, Decision of Lower Court and the Judgment herein are not supported by the evidence*, and are irregular and contrary to law.

Working Models.

It being realized by counsel for the petitioner, that actual machines or working models thereof may be more easily and correctly understood than drawings and descriptions of the same, counsel for petitioner have arranged to produce and demonstrate working models of the machines of both parties to this litigation, at a rehearing of this appeal, if such rehearing is granted by this Honorable Court, so that the Court may see said machines in operation in order to make a true comparison of the same.

Conclusion.

It appearing in this petition that the Defendants-Appellees failed to offer any evidence of lack of infringement of their Sack Jigger machines, as shown in Plaintiff's Interrogatory Exhibit 3-3, and other exhibits; and it appearing that the District Judge failed to consider Plaintiff's-Appellant's *preponderance of evidence of infringement* of

Claim I of his patent in suit, Reissue No. 22,740, by the accused machines shown in said Interrogatory Exhibits 3-3, and other exhibits; and it further appearing that the evidence fails to support the Findings of Fact and the Judgment, as to lack of infringement of Defendants-Appellees, by their accused machines, of Claim 1 of the patent in suit, Reissue No. 22,740:

It is submitted that petitioner is entitled to a rehearing of his appeal, to the end that the Judgment of the District Court be reversed, as to the question of infringement of Claim 1 of the Patent in Suit, Reissue No. 22,740, and that justice be done in the premises.

Respectfully submitted,

ALAN FRANKLIN,

Attorney for Appellant and Petitioner.

J. CALVIN BROWN,
Of Counsel.

Certificate of Counsel.

I hereby certify that I am one of the counsel for the appellant and petitioner, and that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

ALAN FRANKLIN.

